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In the Supreme Court of the United States

OCTOBER TERM, 1989

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. and JOYCE CRUZAN,
Petitioners,

vs.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,
Respondents,

vs.

THAD C. McCANSE, Guardian ad litem,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

RESPONDENT GUARDIAN AD LITEM'S BRIEF

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QUESTIONS PRESENTED

1. Does an incompetent person whose life is being maintained by medically supplied artificial means have constitutional rights of privacy, liberty and equal protection of the law to refuse further treatment which are superior to a state's general interest in preservation of life?

2. If the incompetent has such rights, under what circumstances may they be exercised by a third person?

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SUMMARY OF ARGUMENT

I

A competent adult has a clearly established common law right to either receive or refuse medical treatment. Under the doctrine of informed consent, if one can consent to treatment, one can also refuse it. As this is a decision of the individual, a state cannot force a person to continue with unwanted medical treatment where, as here, no innocent third parties are involved. This proposition is deeply embedded in the traditions of this country.

Although the right to accept or refuse medical treatment is not mentioned in the Constitution of the United States, by logical extension of this court's holdings, the right becomes constitutional in nature as a liberty right under the Fourteenth Amendment or a right of privacy concerning traditional personal values and matters. Also, this court has protected persons from bodily invasions by the state against the will of the individual.

II

As a competent adult has a constitutional right to refuse medical treatment where no innocent third party is concerned, there is no rational reason for holding that an incompetent person loses that constitutional right by reason of the incompetency. The holding of the Missouri Supreme Court in this case that a refusal of medical treatment is a personal decision and, therefore, no one can exercise it on the incompetent's behalf is illogical and indefensible.

On the face of it, the Missouri Supreme Court decision denies the incompetent equal protection of the law. In all cases where the incompetent has not made a formal declaration, under the *Cruzan* decision, there can be no balancing between the incompetent's rights and the

state's interest in preserving life. As neither the incompetent nor anyone else can exercise the right of refusal, the state always prevails.

In holding this, the Supreme Court of Missouri has mandated that the incompetent becomes a second-class citizen in spite of a fundamental constitutional right. The people of this country cannot be divided into two classes where fundamental constitutional rights are concerned. No legitimate government purpose or objective is served by this holding. If a competent person can refuse life saving or life prolonging medical treatment, then an incompetent must have the same right.

III

As Nancy Cruzan is incompetent, her constitutional right to refuse medical treatment necessarily must be exercised by someone on her behalf under appropriate standards or guidelines. The appropriate methods are: evidence of self-determination, substituted judgment or a determination of the incompetent's best interests.

The undisputed evidence in this case is that Nancy Cruzan has severe and permanent damage to her brain and is physically totally and permanently disabled and totally and permanently dependent on others for all her care. She is incontinent of bowel and bladder. Essentially, she has no mind or ability to interact with others or with her environment. If she feels anything at all, it is discomfort. She could live in this condition for perhaps as long as thirty years. Before the accident, she was described by those who knew her best as independent, active, fun-loving, and outgoing. These facts, together with her prior statements to her friend and a sister clearly support a finding that she would not choose to be maintained indefinitely in her present condition.

Under all the evidence there has been a self-determination by Nancy to refuse further treatment.

Even if there were not such clear and convincing evidence, her family, admittedly caring and deeply concerned for her welfare, are the ones who should make the substituted judgment for her. Their decision to see an end of machine-supplied nutrition and hydration was made long after all hope of any recovery or improvement was gone, and after a careful study of the entire situation.

In addition, the court-appointed independent guardians ad litem and attorneys for Nancy Cruzan, have concluded that her interests would be served best by allowing the feeding tube to be removed. There can be no overriding state interest in the preservation of a life with little, if any, humanity or dignity merely because she does not appear to be in deep pain. This life is a burden without a corresponding benefit. She cannot walk, talk, see, communicate, experience human emotions and sensations or recognize those she loved best. It is not necessary to require a finding of intense pain in order to determine that no interest of hers is being served by the state requiring her to continue indefinitely as the biological remains of a human being.

Under any of these tests, the parents and guardians of Nancy Cruzan were entitled to the relief they requested. The Missouri Supreme Court was in error in reversing the Trial Court's decision.

IV

The state's interest in the preservation of life does not override Nancy Cruzan's fundamental right to refuse medical treatment. The state's interest in the preservation of life must always be balanced with conflicting

interests of the individual. But in the case of this incompetent, the Missouri Supreme Court's decision is unbalanced.

The court refused to consider Nancy's quality of life in arriving at its decision holding that the state's interest in life is unqualified. But quality of life is always an important factor when an individual makes a medical decision to accept or refuse treatment. The court's refusal to consider quality of life from the individual's point of view was clear error.

Another inherent flaw in the Missouri Supreme Court decision is that the majority did not limit the decision to the individual involved, but instead took into account the impact of a decision on incompetent persons who may wish to live despite a severely diminished quality of life. That approach begs the question, for if there is evidence an incompetent would choose to live, that personal choice should be upheld. There was no substantial evidence that Nancy would choose to live. The court was in error in basing its decision on speculation about a set of facts not before it.

This approach of the Missouri Supreme Court has made Nancy Cruzan a prisoner of medical technology. As that technology improves, her biological life may be extended indefinitely. It has become a form of involuntary servitude. She did not consent to the surgical insertion of the tube in the first place, and does not consent to this life sentence now. The state is making the medical decisions, not the individual and not the family.

No compelling state interest has been shown in this case to overcome the facts presented here of the individual's right to choose to be allowed to die. The decision of the Missouri Supreme Court is basically flawed and should be reversed.

ARGUMENT

I

An Adult's Right to Refuse Medical Treatment Is a Liberty Interest Under the Due Process Clause and Is a Fundamental Interest Traditionally Protected by Our Society Which Is Beyond the Power of the State to Deny.

The Missouri Supreme Court recognized a common law right of individual autonomy over decisions relating to an individual's health and welfare. Pet. App. A20.[1] It then concluded that if there was a right under the United States Constitution, it must be a right to privacy under *Roe v. Wade,* Pet. App. A22. But, as the United States Supreme Court has not held specifically that the right of privacy permits a patient or her guardian to direct the withdrawal of food and water, it refused to use *Roe v. Wade* as authority to do so. Pet. App. A23. It also declined to decide any issue relating to the authority of competent persons to suspend life-sustaining treatment in the face of terminal illness or otherwise. Pet. App. A38.

In order to determine the extent of the rights of an incompetent, it must be first decided whether a competent adult has a right based on the United States Constitution to refuse unwanted medical treatment. In making an analysis of the extent of the constitutional liberty interest, it must be determined whether or not a refusal of medical treatment is an interest traditionally

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1. The *Cruzan* decision of the Missouri Supreme Court is reported at 760 S.W.2d 408 and is set forth in petitioner's appendix to the petition for a Writ of Certiorari. References to the appendix are identified as "Pet. App."

protected by our society. See *Michael H. v. Gerald D.*, 109 S.Ct. 2333 (1989).

In 1891, this court in *Union Pacific Railway Company v. Botsford,* 11 S.Ct. 1000, stated:

> "No right is held more sacred or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 1001.

Justice Brandeis used similar terminology in describing the fundamental right of liberty protected by the Due Process Clause, namely "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis J. dissenting).

Freedom from unconsented invasion of the person has been upheld by this court in other settings. In *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942), the court invalidated on equal protection grounds the sterilization of habitual criminals. In *Winston v. Lee,* 470 U.S. 753 (1985), it was held that a criminal defendant could not be compelled to submit to surgery to remove a bullet on the ground that such an intrusion invades the individual's sense of personal privacy and security. In *Schmerber v. California,* 384 U.S. 757 (1966), this court stated that the integrity of an individual's person is a cherished value of our society. *Id.* at 772. In *Rochin v. California,* 342 U.S. 165 (1952) it prohibited forced stomach pumping to acquire evidence in a criminal case as offensive to human dignity under the Due Process Clause of the Fourteenth Amendment.

State Appellate Courts specifically have found a federal constitutional right to refuse medical treatment of a life-prolonging nature. See, e.g., *Rasmussen v. Fleming,* 741 P.2d 674 (Ariz. banc 1987); *Bouvia v. The Superior Court of Los Angeles County,* 179 Cal. App. 3rd 1127, 225 Cal. Rptr. 297; *In re Colyer,* 660 P.2d 738 (Wash. 1983); *In re Quinlan,* 355 A.2d 647 (N.J. 1976); *Superintendent of Belchertown State School v. Saikewicz,* 370 N.E.2d 417 (Mass. 1977). See also *Gray v. Romeo,* 697 F.Supp. 580 (D.C.R.I. 1988). In *Bouvia* the court described the right to refuse medical treatment as the right of self-determination or a principle of personal autonomy properly grounded in the liberties protected by the Fourteenth Amendment's Due Process Clause. Also, in *Gray v. Romeo* it was held that the right to refuse medical treatment, whether described as the principle of personal autonomy, the right of self-determination or the right of property, is properly grounded in the liberties protected by the Fourteenth Amendment's Due Process Clause and as a right grounded in the notion of an individual's dignity and interest in bodily integrity.

The deeply personal decision to accept or refuse medical treatment affecting one's own body has been recognized as a part of the tradition of our society for almost a hundred years and, thus, under an extension of this court's holdings in a number of cases cited above becomes a constitutional right. See *Michael H. v. Gerald D.*, 109 S.Ct. 2333 (1989).

II

As a Competent Adult Has a Constitutionally Protected Right to Refuse Medical Treatment, the Missouri Supreme Court in Refusing to Allow the Right to Refuse Treatment to Extend to an Incompetent Denies Incompetents Equal Protection of Law in Violation of the Fourteenth Amendment.

In its analysis of this case, the Missouri Supreme Court reasoned that a decision as to medical treatment must be informed and that three elements must be present: the patient must have capacity to reason and make judgments, the decision must be made voluntarily and without coercion, and the patient must have a clear understanding of the risks and benefits of the proposed treatment alternatives or nontreatment along with a full understanding of the nature of the disease and the prognosis. Pet. App. A21.

The court held that a decision to refuse treatment should be as informed as the decision to accept treatment.[2] Pet. App. A37. It then went on to hold that the common law right to refuse treatment is founded in personal autonomy and could not be exercised by a third party "absent formalities" and, therefore, the coguardians did not have authority to order the withdrawal of hydration and nutrition to Nancy. Pet. App. A41-42. What this means is that an incompetent merely by reason of the incompetency, loses the right of refusal of medical treatment that a competent person can exercise.

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2. In this case the consent for the insertion of the tube was given by her then husband, Paul Davis. Pet. Ex. 10, Tr. 423. Nancy then, as now, was unable to communicate. The trial transcript is part of the record transmitted to this Court by the Missouri Supreme Court. References to it are identified by the abbreviation "Tr."

Two classes of personal rights are thereby established, one for competents and one for incompetents.

As a competent adult's right of refusal of medical treatment is constitutional in nature, as well as based on common law, the Missouri Supreme Court in denying this right to Nancy Cruzan simply by reason of her incompetency, denies her the equal protection of the law.[3] In the case of a patient in a persistent vegetative state (PVS) such as Nancy, obviously her rights must be exercised by another or they are lost. This Court recognized this in *Thompson v. Oklahoma*, ... U.S. ....., 108 S.Ct. 2687 (1988) (Plurality Opinion),

> "The law must often adjust the manner in which it affords rights to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain 'rights,' to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principal in mind." *Id.* at 2693, n.23.

In *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417 (SJC, Mass. 1977), the court held that, based on principles of equality and respect for all individuals, the right to refuse medical treatment must extend to an incompetent as well as a competent patient because the value of human dignity extends to both. An incompetent individual does not lose the right to have life-sustaining treatment withheld by virtue of his or her incompetency, *In re Hamlin*, 689 P.2d 1372 (Wash. 1984); and *In re Colyer*, 660 P.2d 738 (1983).

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3. The action of state courts in their official capacities is regarded as action of the state within the meaning of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).

"It does not advance the interest of the state or the ward to treat the ward as a person of lesser status or dignity of others. To protect the incompetent person within its power, the State must recognize the dignity of worth of such a person and afford to that person the same panoply of rights and choices it recognizes in competent persons." *Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626 (Mass. 1986), quoting from *Saikewicz, supra.*

The reason for this holding is stated forcefully in *Eichner v. Dillon,* 73 A.D.2d 431, 420 N.E.2d 64:

"[B]y standards of logic, morality, and medicine, the terminally ill shall be treated equally, whether competent or incompetent. Can it be doubted that the 'value of human dignity extends to both?' . . . [A]ny state scheme which irrationally denies to the terminally ill incompetent that which it grants to the terminally ill competent patient is plainly subject to constitutional attack." 73 A.D.2d at 464-75.

To determine whether or not a classification denies equal protection of law under the Fourteenth Amendment, the purpose of the classification must be examined. If the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class, the test is strict scrutiny. *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976). Fundamental rights are those of a uniquely personal nature, such as the right to marital privacy, *Griswold v. Connecticut,* 381 U.S. 479 (1965), and to an abortion, *Roe v. Wade,* 410 U.S. 113 (1973).[4] Other ex-

4. There is no innocent third party in this case. The vexing questions of when a fetus becomes a whole persor or when the state's interests in protecting potential human life becomes compelling are not involved here.

amples include the right to vote discussed in *Bullock v. Carter,* 405 U.S. 134 (1972); the right of interstate travel, *Shapiro v. Thompson,* 394 U.S. 618 (1969); first amendment rights, *Williams v. Rhodes,* 393 U.S. 23 (1968); and the right to procreate, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942).

The right to accept or refuse medical treatment is just as much of a fundamental, uniquely personal right as those just mentioned. Yet, the court's holding that as it was a personal right, it could not be exercised by others is completely inconsistent with equal protection of law under the Fourteenth Amendment.[5]

An equal protection analysis in this case requires strict scrutiny of the classification of competents and incompetents to see whether it is necessary to the achievement of a compelling state interest. *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972). As the right to refuse medical treatment is implicitly guaranteed by the Constitution, the state has the burden of justifying the classification. See *San Antonio Independent School District v. Rodriquez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973). This burden was not met in the *Cruzan* case.

The Supreme Court of Missouri conceded that the only compelling state interest in this case is the preservation of life. Pet. App. A25. It stated this as an interest in prolonging the life of an individual and an interest in the sanctity of life itself. But, of course, that interest would apply equally to a competent person.

The decision turned out to be self-contradictory. The court found a state policy favoring life in the Uniform

5. The court seemed to permit the exercise of the right if there was clear and convincing, inherently reliable evidence. Pet. App. A41.

Rights of the Terminally Ill Act (URTIA) which permits a competent person to execute a formal document allowing that person to refuse death-prolonging medical treatment in the event of a terminal illness and in the event that the person became incompetent and unable to refuse such treatment as a result. This simply means that a competent person can choose to execute a document permitting the withholding or withdrawal of artificial life-support measures (not including nutrition and hydration) and thereby hasten death. But the right to withhold artificial life-support measures is denied to an incompetent.

The court specifically declined to decide the issue whether a competent person could suspend life-sustaining treatment in the face of terminal illness or otherwise. Pet. App. A38. By leaving the issue open it seems to be implying that it might decree that a competent adult might have to receive life-sustaining medical treatment if the state says so. To even imply that if you are injured in some respect, you have to go to a doctor or a hospital whether you want to or not is a long step down the road to tyranny. Certainly, it is inconsistent with the living will act provision that a person can have death prolonging medical treatment withheld or withdrawn. Again, the decision is unstable.

Other courts have held uniformly that a competent person has a right to refuse life-prolonging treatment, even if the decision means the person might or will die. Among these decisions are *In re O'Connor*, 531 N.E.2d 607 (N.Y. 1988);[6] *Bouvia v. Superior Court*, 179 Cal. App. 3rd 1127, 225 Cal. Rptr. 297 (1986); and *Barber v. Superior Court*, 147 Cal. App. 3rd 1006, 195 Cal. Rptr. 44 (1983); *In re Gardner*, 534 A.2d 947 (Me. 1987); *In re Conroy*, 486 A.2d 1222 (N.J. 1985); and *Gray v. Romeo*, 697 F.Supp. 580 (D.R.I. 1988). It would seem that the only valid reason for treating incompetents differently than competents would be a concern for those unable to protect themselves. But in this case, as in others, independent guardians ad litem were appointed whose responsibility was to protect the interests of the ward. *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977); *Rasmussen v. Fleming*, 741 P.2d 674 (Ariz. 1987); *In re Gardner*, 534 A.2d 947 (Me. 1987); *In re Jobes*, 529 A.2d 434 (N.J. 1987); and *Gray v. Romeo*, 697 F.Supp. 580 (D.R.I. 1988). Thus, incompetents' interests may be fully protected without denying them fundamental rights. No compelling state interest is achieved by putting incompetents in a separate class in this situation.

In view of the foregoing, the classification by the Missouri Supreme Court between rights of competents and incompetents in regard to refusal of medical treatment will not stand strict scrutiny, nor is it based on any rational state purpose.

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6. Relief was denied the incompent in the *O'Connor* case. But the court pointed out specifically that it was not holding that an incompetent cannot forego the use of artificial life-sustaining machines offering no hope of improvement or hope of cure.

III

The Missouri Supreme Court Erred in Holding That There Was Not Sufficient Evidence of Nancy Cruzan's Refusal of Life-Prolonging Medical Treatment, in Not Allowing Her Family to Exercise Substituted Judgment in Making a Decision to Withdraw the Feeding Tube, and in Failing to Find That It Was in Nancy Cruzan's Best Interest That the Feeding Tube Be Removed.

A

Self-Determination

The Missouri Supreme Court determined that there was no inherently reliable evidence of Nancy Cruzan's wishes based on her statements alone. It required a formal declaration made while the person was competent in order to determine a person's wishes. It refused to allow the family members to substitute their judgment based on their knowledge of Nancy in determining whether the tube feeding should be discontinued. It also refused to find that it was in Nancy Cruzan's best interest that the tube feeding be discontinued.

All of the medical testimony in this case was that Nancy Cruzan suffered severe and permanent damage to the higher parts of the brain that control the conscious mind, the abiliy to think and react to the environment. All who testified agreed that this was due to a significant lack of oxygen at the time that she was involved in the automobile accident. All agreed that she is physically totally disabled and will never recover from that condition. All agreed that she is totally dependent on others for all of her care and always will be.

Petitioners argue that a high standard of proof set up for incompetent persons will in practical effect deny virtually all incompetent persons, as a class, the right of fundamental liberties. Pet. Br. p. 41. If petitioners are referring to the requirement of a formal declaration of a refusal to consent to many life-sustaining medical treatments, these respondents agree. However, respondents also feel that in a case such as this, the evidence should be clear and convincing, not only as to the medical condition and prognosis, but as to evidence bearing on the issue of self-determination. See *In re Eichner,* 73 A.D.2d 431, 246 N.Y.S.2d 517 (N.Y. App. Div. 1980); *In re Jobes,* 529 A.2d 434 (N.J. 1987); *In re Gardner,* 534 A.2d 947 (Me. 1987).

The evidence to support an incompetent's right of self-determination is just as important as the medical prognosis or condition especially, as in this case, where the withdrawal of the support will result in the patient's death. However, respondents believe that the evidence in this case was clear and convincing. Not only did Nancy Cruzan tell her housemate that she would not want to live as a vegetable, Tr. 389-90, 395-96, she also said that "if she was going to live, she wanted to be able to live, not to just lay in a bed and not be able to move because you can't do anything for yourself or go enjoy your life or do what you want to do." Tr. 396.

Witness after witness who knew Nancy, family, friends, and fellow workers, in describing her character invariably used the word "independent." Tr. 397, 415, 511, 546, 557, 580, 588. She was also described as vivacious, outgoing, proud, fun-loving, and active. Tr. 397, 398, 411, 511-13, 534-35, 557, 580, 588. As guardians ad litem, it was our opinion that, taking into account the

statements that Nancy made to her sister and her friend, together with her personality, character, and lifestyle, the evidence was clear and convincing that were she able to forecast her present condition, she would demand that the feeding tubes be removed. Yet, most of this evidence was ignored by the Missouri Supreme Court.

The Missouri Supreme Court viewed the evidence of Nancy's profoundly diminished capacity as quality of life considerations which cannot support a decision to cause death. Pet. App. A34.[7] Yet, when the court argues that the issue is not whether continued feeding and hydration for Nancy is medical treatment, and the issue is whether providing food and liquid is a burden to her, the court is really talking about quality of life. We can all agree that the state has no right to determine whether or not a person should die based on quality of life. But certainly, quality of life is always a factor on the part of an individual, competent or otherwise, in determining medical treatment choices. That choice should be by or for the individual, certainly not by the state.

Judge Higgins, in his dissent, correctly accuses the majority of refinding the facts to support its result. Pet. App. A65-66. The majority in holding that the evidence of her wishes was inherently unreliable improperly chose to ignore a great deal of the evidence on the subject.

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7. The court resolutely refused to acknowledge that the cause of the death would be the underlying condition, not the removal of the artificial support system. See discussion in Point III B *infra*.

B

Substituted Judgment

A second method used by some courts in similar cases is substituted judgment of a family where there has been no clear direction by the incompetent. In this case, the majority recognized that the family was a caring, committed group and that there was no malevolent purpose that could be ascribed to them. Pet. App. A9-10. The substituted judgment approach by family members is especially appropriate in this case for Nancy was very close to her family and was greatly loved by them. Tr. 415, 446, 526, 532. The family knew her completely. No financial or ulterior motive is shown on their part. Nor was this a hasty decision on their part, but one reached only after a long time had passed and after a great deal of personal anguish and soul-searching. Tr. 432-34, 496-97, 519.

The request to discontinue the life support was made in May of 1987, Tr. 436, well over four years after the accident. Both parents consulted a psychologist who described the process of realizing that there was no hope as long and gradual. Tr. 497. There were also discussions with the family doctor and conversations with support groups and with numerous other people. The family is convinced that what they are asking is what Nancy would want to do. Tr. 519-20. Their oldest daughter, who was Nancy's closest friend, was a part of the decision-making process and in full accord with it. Tr. 438.

This family situation is similar to the one *In re Quinlan*, 355 A.2d 647 (N.J. 1976) where the incompetent's father was appointed guardian and given the right to exercise his best judgment, subject to certain guide-

lines, to terminate a permanent noncognitive vegetative existence. The father was described as very sincere, moral, ethical, and religious. *In re Jobes*, 529 A.2d, it also was held that if there are close and caring family members willing to make a decision to terminate a life-support system, they are the best qualified to make substituted judgment not only because of their special grasp of the patient's approach to life, but also because of their special bond with the patient.[8]

In *McConnell v. Beverly Enterprises*, 209 Conn. 692 (1988), the court pointed out that when a family is unanimous, the court must place great weight on their decision to enforce the desires of their loved one. A united caring family is in the position to assess most directly what the incompetent's decision would be and the effect of that decision would be most deeply felt by them. The patient's wishes could thus be subjectively determined by the surrogate decision makers. That is exactly the situation in this case.

The Missouri Supreme Court contended that the cases which relied on the doctrine of substituted judgment to permit guardians to choose termination of life support failed to consider the source of the guardian's authority, the state's parens patriae power. That simply is not true. In *In re Drabick*, 245 Cal. Rptr. 840 (1988), the incompetent's brother was appointed as conservator. The California Probate Code allowed the conservator to have the exclusive authority to give consent for medical treat-

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8. As noted in the *Jobes* case, if there is a dispute among members of a patient's family, any interested party can invoke judicial aid to insure that the patient is protected. In the pending case where the Trial Court appointed independent attorneys and guardians ad litem because of the possible conflict of interest between the guardians and the ward.

ment if the conservatee has been adjudged incapacitated. The court stated,

> "We are satisfied that this statute, by necessary implication, gives the conservator power to withhold or withdraw consent to medical treatment under appropriate circumstances."[9] 245 Cal. Rptr.

The California Probate Code contemplates that a conservator faced with a decision about medical care will exercise his judgment. Following this process the conservator may consent to treatment, but just as importantly, he may also withhold consent. Unless the Probate Code is read to include the correlative power, the statute would simply—and absurdly—require the conservator to approve blindly all medical recommendations. The court said this cannot be what the legislature intended since to deny conservators the power to withhold consent would render meaningless the statutory reference to a decisional process.

Section 475.120.3, RSMo. 1986, quoted by the Missouri Supreme Court in the *Cruzan* decision, Pet. App. A39, provides that the guardian of an incapacitated ward has power to:

> "(2) Assure that the ward receives medical care and other services that are *needed*." (Emphasis supplied.)

The determination of necessity of medical care obviously involves the discretion of the Missouri guardian just as much as in the case of the California conservator.

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9. The California Probate Code gave the conservator: "The exclusive authority to give consent for such medical treatment to be performed on the conservatee as the conservator in good faith based on medical advice determines to be necessary . . ." Cal. Probate Code, Section 2355(a).

In both situations to claim that the guardian or conservator must follow all medical recommendations is absurd.

In *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987) (en banc), a statute provided that a guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service. Nevertheless, the Supreme Court of Arizona held:

> "[T]he right to consent to or approve the delivery of medical care must necessarily include the right to consent to or approve the delivery of *no medical care*. To hold otherwise would . . . ignore the fact that oftentimes a patient's interests are best served when medical treatment is withheld or withdrawn. To hold otherwise would also reduce the guardian's control over medical treatment to little more than a mechanistic rubber stamp for the wishes of the medical treatment team." 741 P.2d at 688.

In reaching this decision, it relied on similar holdings *In the Matter of the Guardianship of Hamlin*, 102 Wash. 2d 817, 689 P.2d 1372 (1984) and *In the Matter of the Conservatorship of Torres*, 357 N.W.2d 332 (Minn. 1984).

The Missouri court's rejection of the doctrine of substituted judgment in determining treatment decisions is based on the assumption that the doctrine authorizes a guardian to *cause* the death of a ward unilaterally, without interference by the state and contrary to the state's interest in preserving life and assuring the safekeeping of those who cannot care for themselves. The court refused to recognize that in this case the guardians are not causing the death of the ward, but are allowing her to die from the injuries she received. In other jurisdictions similar cases have held uniformly that the patient is not

being killed, but is being allowed to die from the injury, disease or condition that incapacitated the patient in the first place. Some examples are *Gray v. Romeo*, 697 F.Supp. 580 (D.R.I. 1988); *In re Conroy*, 486 A.2d 1209 (Sup.Ct., N.J. 1985); *Satz v. Perlmutter*, 362 So.2d 359 (Dist. Ct. App. 1978); *In re Colyer*, 660 P.2d 738 (Wash. 1983); *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977); *Corbett v. D'Alessandro*, 487 So.2d 369 (Fla. 1986); *In re Gardner*, 524 A.2d 947 (Me. 1987); *Bartling v. Superior Court*, 163 Cal. App. 3rd 186, 209 Cal. Rptr. 220 (1984); and *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

The reasoning is that the patients were being kept alive by artificial means. In all cases, the treatment was not designed to cure, but rather to maintain an incurable malady. The removal of the artificial support was simply allowing nature to take its course. The Missouri Supreme Court was in error in refusing to accept the substituted judgment of the family members.

C

Best Interests

The third test for determining whether an incompetent's life-sustaining systems may be withdrawn is the question of whether it is in the incompetent's best interests. The Missouri Supreme Court simply ignored this test, even though the independent court-appointed guardians ad litem and attorneys for Nancy Cruzan concluded that under the evidence, it was in her best interests that the life-support system be terminated.

In *In re Link*, 713 S.W.2d 487 (Mo. banc 1986), the Supreme Court of Missouri held that appointed counsel is a valuable guarantor of the alleged incompetent's

rights. In *In re M--*, 446 S.W.2d 508 (Mo. App. 1969), the court held that a guardian ad litem is required to take all steps reasonably necessary to protect and promote the interests of the ward in the litigation. The court in *Link* held that although several rights are enumerated in the statutes, the attorney for the ward could waive those rights if that was in the ward's best interest. This included waiver of a jury trial. The primary concern is whether the action would promote the best interests of the ward.

As guardians ad litem and attorneys, we have no right to demand that the feeding tube be withdrawn. But, we took an active part in the hearing, produced nine witnesses, offered twelve exhibits, wrote trial and posttrial briefs, and took part in oral argument before the Missouri Supreme Court. Yet, our recommendations that it was in Nancy's best interests to have the artificially supplied nutrition and hydration terminated were ignored.

Although the Supreme Court of Missouri stated that Nancy will remain in a persistent vegetative state until her death, Pet. App. A34, and that a feeding by a tube already in place would not be a painful invasion, the Trial Court found that

> "Her highest cognitive brain function is exhibited by her grimacing, perhaps in recognition of ordinarily painful stimuli, indicating the experience of pain and apparent response to sound." Pet. App. A95.

Nancy's present condition is that she has contractures in both upper and lower extremities which are irreversible changes in tendon and joints. Her wrists, fingers, and hands are frozen at that posture and nothing

can be done to unfreeze them. Tr. 143-44. She cannot swallow normally, Tr. 164, and she is totally dependent on others. Tr. 193. She is incontinent of bowel and bladder and changes are made in the linen when this occurs. Tr. 317. She has no future from a medical or mental point of view. Tr. 337. Her face is usually red, arms are drawn up and directed in and her legs are drawn toward her chest. Tr. 371. She drools, her hair gets wet, as do her gown and sheets. Tr. 444-45. Her mother, father, and older sister all feel that it is in her best interests that the feeding tube be discontinued. Tr. 444, 521, 543.

The attitude of the Supreme Court of Missouri is that Nancy can feel no pain, and the burden of the feeding tube is not substantial for her, therefore the state's interest in the preservation of life outweighs any rights invoked on Nancy's behalf. Pet. App. A43. Although the court referred to the benefit that life conveys both to Nancy and her loved ones, Pet. App. A9, nowhere is that benefit explained. It ignored the fact that a PVS patient cannot experience either benefits or burdens of treatment. Tr. 196.

Although some courts have determined that where a continued existence is painful, it is in the ward's best interests to have life-support systems terminated, *Superintendent of Belchertown State School v. Saikewicz, supra*, other courts have found that the discontinuance of life-support systems in persistent vegetative state patients was in their best interests even though they can experience no pain.

In re Dratick, 200 Cal. App. 3d 185, the court pointed out that the PVS patient's life was prolonged because it was possible, not because anyone purporting to speak

for him has decided that it was the best or the wisest course. The court:

> "Life-sustaining treatment is not 'necessary' under Probate Code Section 2355 if it offers no reasonable possibility of returning the conservatee to cognitive life and if it is not otherwise in the conservatee's best interests, as determined by the conservator in good faith."

It may be possible, as the doctors have testified, to keep Nancy in this condition for thirty years or more. However, at some time her brainstem will stop functioning and she will be legally dead. She will not improve any before that time. It is impossible to see how her interests are being best served by maintaining her in this condition until that inevitable time comes. No aspect of the life she used to know is possible now. Neither should she be maintained in this limbo because of speculation by the court that its decision might affect the right of some unknown person who might choose to remain in a similar condition although never having expressed that choice. This is Nancy's case, not that of someone else under some other set of facts. Again, the Missouri court contradicted itself, for it started by saying the decision was limited to a single issue, Pet. App. A6, A9, and then extended its holding to protect others in hypothetical situations. Pet. App. A10, A43, A45.

There is ample evidence to uphold the Trial Court's decision to allow the feeding tube to be disconnected under any of the three tests outlined above. The Supreme Court of Missouri erroneously failed to recognize this in its decision.

IV

Under the Facts of This Case, the State's Interest in Preservation of Life Is Not Superior to Nancy's Right to Discontinue Further Treatment. The Missouri Court Erred in Holding That the State Has the Paramount Right to Demand That the Artificial Life Support System Be Maintained.

In cases involving questions of the removal of life-support systems, four state interests have been identified: preservation of life, prevention of homicide and suicide, protection of innocent third parties and maintenance of the ethical integrity of the medical profession. Pet. App. A25. *Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626 (Mass. 1986). In this case the Missouri Supreme Court majority conceded that only the state's interest in the preservation of life is implicated. Pet. App. A25.

The majority argued that the state's interest in life embraces an interest in prolongation of life of the individual and an interest in the sanctity of life itself. Pet. App. A25. It found the prolongation interest particularly valid in Nancy's case for she is not terminally ill and will continue a life of relatively normal duration if allowed basic sustenance. Pet. App. A26. However, the fact that her life is not normal in any other sense of the word was not a part of the court's consideration as to the balancing test of individual rights versus state's rights. The majority claims that life is precious and worthy of preservation without regard to its quality, and states that any substantive principle of law they adopt must provide shelter for those who would choose to live—if able to choose—despite the inconvenience that choice may cause others.

Again, the court has strayed from the facts before it for the inconvenience to the family was never a factor in the decision of Nancy's parents and guardians to ask for removal of the tube. There is absolutely no evidence that Nancy's parents and guardians were motivated in the slightest by any personal inconvenience. It was the inconvenience and the loss to Nancy that motivated them. Tr. 452. Their suffering only became important because they knew that Nancy would not want that to occur and, therefore, became part of her choice. Tr. 446, 544.

Another example of the majority's misunderstanding of the issues involved is the statement:

> "But the state's interest is not in quality of life. The broad policy statements of the legislature make no such distinction; nor shall we. Were quality of life at issue, persons with all matters of handicaps might find the state seeking to terminate their lives. Instead, the state's interest is in life; that interest is unqualified." Pet. App. A29.

In this case, it is not the state which is seeking to terminate life. Instead, it is the individual through her parents and guardians who are asking that she be allowed to die from her original injuries. We can all agree that the state has no right to determine who shall live where capital crimes are not involved, but that is not the point under consideration. Quality of life issues are critical to the patient in many situations. Should one undergo an amputation, or risk a shortened life? Should a painful course of treatment be accepted in the hope of some prolongation of life? Treatment risks and alternatives are always a factor and quality of life is always a major consideration in medical decisions.

At some point Nancy is going to die. At some point she will become terminally ill. Yet, the Missouri court's decision leaves the guardians, or anyone who may be then acting on Nancy's behalf if she outlives her parents, with the duty to prolong her life as she had never made a formal statement to the contrary.

As the Missouri Supreme Court has mandated that this care must continue, Nancy Cruzan is, indeed, a prisoner of medical technology to which she has not consented and of which there is substantial evidence that she would not choose. In a sense, it is a form of involuntary servitude, for neither she nor anyone else has any choice but to allow the continuation of the medical treatment. See *U. S. v. Solomon, et al.*, 563 F.2d 1121 (4th Cir. 1977).

The Missouri Supreme Court stated four standards of review of a court-tried case: whether there is substantial evidence to support the Trial Court's decision, whether the decision is against the weight of the evidence, whether it erroneously declares a law or whether it erroneously applies a law. The majority's decision was not based on a lack of substantial evidence or on the theory it was against the weight of the evidence. Instead, the court found that the Trial Court erroneously declared the law and, therefore, they reversed the decision. Pet. App. A6. But after apparently conceding that the Trial Court's decision was substantially supported by the evidence, and was not against the weight of the evidence, it overruled the court based on a lack of evidence. This is another inconsistency in the opinion.[10]

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10. Another inconsistency is that the deciding vote was cast by a lower court judge. Even in a case of this magnitude, the

(Continued on following page)

If there is any theme or direction to the decision, it is the preservation of life or the sanctity of life. Under the court's rationale, it would almost never allow termination of life support systems except as directed by the Living Will Act. Yet, in a case of almost the same set of facts, the Supreme Court of New Jersey, *In re Jobes*, 529 A.2d 434 (N.J. 1987) held exactly the opposite. The Missouri court considered the *Jobes* case only in the context that the statements made by the incompetent before her accident were remote, general, spontaneous, and made in casual circumstances. Pet. App. A37. It rejected the idea that the family could make the determination to remove life-support. The Missouri majority did not accept the New Jersey court's reasoning in *Jobes* when it determined that the state's interest in prolonging life weakened as the degree of bodily invasion increases and the prognosis for recovery to a cognitive sapient state dims. The *Jobes* court found it difficult to conceive of a case in which the state could have an interest strong enough to subordinate a patient's right to choose not to be sustained in a persistent vegetative state. That is just the situation in the *Cruzan* case.

The proposition of the state's interest in preserving life was also discussed in *Gray v. Romeo*, 697 F.Supp. 580 (D.R.I. 1988), where the court stated:

> "Essentially, this controversy concerns the question of whether or not the State can insist that a person in a vegetative state incapable of intelligent sensation, whose condition is irreversible, may be required

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Footnote continued—

Missouri Supreme Court chose to ignore its own rules and a state statute dealing with special judges. Welliver, J., dissenting from the denial of the motion for a rehearing. Pet. App. A87-88.

> to submit to medical care under circumstances under which the patient prefers not to do so. In this light the issues presented do not essentially involve death, but essentially relate to life and its circumstances." *Id.* at 584.

There were no formal declarations by the patient in the *Gray* case, yet the court held that her wishes should prevail over the state's rights involving the continuation of provision of nourishment and hydration.

A number of other states have also held that the right to refuse treatment survives incompetence and outweighs the state's interest in preserving life; *In re Drabick*, 245 Cal. Rptr. 840 (Cal. App. 1988); *In re Gardner*, 534 A.2d 947 (Me. 1987); *Rasmussen v. Fleming*, 741 P.2d 674 (Ariz. 1987); *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 516 N.Y.S.2d 677 (1987); *Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626 (Mass. 1986); *Matter of Conservatorship of Torres*, 357 N.W.2d 332 (Minn. 1984); *In re Colyer*, 660 P.2d 738 (Wash. 1983); *Foody v. Manchester Memorial Hospital*, 482 A.2d 713 (Conn. 1984); *John F. Kennedy Hospital v. Bludworth*, 452 So.2d 921 (Fla. 1984).

In effect, the Missouri majority has made the state's interest in preserving the life of an incompetent absolute where the incompetent has not executed a living will or some other formal document. No other state has gone this far. A PVS patient's right of refusal of life-sustaining medical treatment depends on where that person lives. In Missouri, he or she has no choice.

CONCLUSION

The questions presented in this brief are answered as follows:

1. An incompetent person whose life is being maintained by medically supplied artificial means has a constitutional right to refuse treatment, which rights are superior to the state's interest in the preservation or prolongation of life; and

2. These rights may be exercised on the incompetent's behalf either in accordance with evidence of self-determination, by substituted judgment of the family or by evidence that the termination would be in the incompetent's best interests.

For refusing to recognize and uphold these rights, the decision of the Missouri Supreme Court is erroneous and should be reversed.

Respectfully submitted,

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